STATE OF MICHIGAN

COURT OF APPEALS

ROGER POTTER and SUZANNA POTTER,

Plaintiffs-Appellants,

v

INGHAM REGIONAL MEDICAL CENTER, a/k/a MICHIGAN CAPITAL MEDICAL CENTER and DR. MARY BETH MILLER,

Defendants-Appellees.

UNPUBLISHED
February 18, 2003

No. 237450
Ingham Circuit Court
LC No. 99-090929-NH

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

MEMORANDUM.

Plaintiffs appeal as of right the order granting defendants' motion for summary disposition in this medical malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs brought this action alleging that defendants were negligent in failing to timely administer tissue plasminogen activator (t-PA) when Roger Potter presented to the hospital emergency room with symptoms of a stroke. The trial court granted defendants' motion in limine to exclude testimony of plaintiffs' expert witness, and granted summary disposition, finding that plaintiffs could not meet the requirements of MCL 600.2912a(2).

MCL 600.2912a(2) governs the burden of proof requirements in medical malpractice actions. It provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002), this Court found the statute ambiguous, as it could be interpreted either as requiring that the initial opportunity to survive must be over 50%, or that the portion of the opportunity that was lost was greater than 50%. The Court found that the statute was amended in response to *Falcon v*

Memorial Hosp, 436 Mich 443; 462 NW2d 44 (1990), and it was intended to counter the *Falcon* conclusion that the loss of a 37.5% opportunity to survive was recoverable. *Fulton* concluded that the loss of opportunity itself must be greater than 50%. Where the plaintiff's initial opportunity to survive was 85%, and her opportunity to survive after the malpractice was 60% to 65%, the loss of opportunity was not greater than 50%, and the trial court erred in denying summary disposition. *Id.*, 84.

Following *Fulton*, even if their expert were qualified, plaintiffs failed to present evidence that would meet the requirements of MCL 600.2912a(2). The evidence presented showed that without the alleged malpractice, plaintiff's opportunity for a complete recovery was 75%. With the malpractice, the opportunity was reduced to 50%. Where the statute requires that the lost opportunity be greater than 50% to allow for a recovery, plaintiffs failed to meet that requirement. If defendants committed malpractice by failing to timely administer t-PA, that malpractice was not actionable under MCR 600.2912a(2).

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray